

Lim Kee Fu v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NOS W-05(M)-117-02 OF 2018 AND W-05(M)-120-02 OF 2018
SURAYA OTHMAN, HADHARIAH ISMAIL AND NORDIN
HASSAN JJCA
17 NOVEMBER 2020

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants convicted and sentenced to death for offence of trafficking in dangerous drugs — Whether trial judge committed serious misdirection in placing great weight on appellants' attempt to flee — Whether trial judge erred in giving too much weight to evidence of tenant — Whether trial judge misdirected himself in failing to consider lapses in police investigation — Whether trial judge applied both presumptions under s 37(d) and (da) — Whether trial judge misdirected himself in law on proper interpretation of s 37(da) — Whether trial judge misdirected himself on issue of common intention — Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a) & (2)

Evidence — Admissibility — Conduct — Conduct of appellants fleeing from crime scene — Whether admissible — Whether conduct of appellants in fleeing from crime scene showed that appellants had knowledge of impugned drugs — Evidence Act 1950 ss 8 & 9

Both the appellants were convicted and sentenced to death by the High Court for an offence of trafficking in dangerous drugs ('the said drugs') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same Act. The police officers led by SP10 found the said drugs in the appellants' house. The established facts relied upon by the trial judge were as followed: (a) the second appellant's DNA were found on the tooth brush, shaver and comb which were seized from the house; (b) SP5 who was found sleeping in one of the room in the said house during the raid had rented the said room from the second appellant with a monthly rental of RM500; (c) both the appellants ran out from the house and hid behind the neighbours' house when SP10 introduced himself as a police officer; (d) at the material time, the appellants had control of the house; and (e) the prosecution's witnesses were credible. In defence, the appellants contended that they had no knowledge of the said drugs and the house belonged to their colleague named Ah Chong who had left the house before the police raided the house. At the end of the case, the learned trial judge found that the appellants' defence were mere denials and an afterthought and the defence had failed to rebut the

- A presumption of trafficking under s 37(da) of the DDA and further failed to raise a reasonable doubt on the prosecution case. In the present appeal, the appellants relied upon the following grounds: (i) the trial judge committed serious misdirection in placing great weight on the fact that the appellants had attempted to flee when the police raided the house; (ii) the trial judge erred in
- B giving too much weight to the evidence of SP5 that she rented a room in the house from the second appellant; (iii) the trial judge misdirected himself in failing to take into account the serious lapses in the police investigation in the present case which included the failure of the police to conduct chemical examination on the slimming tea found in SP5's bag, failure to locate Ah
- C Chong and failure to locate SP5 for the purpose of recall by the defence; (iv) the trial judge appeared to apply both the presumption of possession under s 37(d) of the DDA and the presumption of trafficking under s 37(da) of the DDA at the close of the prosecution case; (v) the trial judge misdirected himself in law on the proper interpretation of s 37(da) when invoking the said presumption;
- D and (vi) the trial judge misdirected himself on the law and the facts on the issue of common intention on the part of the appellants.

Held, dismissing the appeal, and affirming the conviction and sentence by the trial judge:

- E (1) The appellants' conduct in fleeing from the scene was admissible under s 8 of the Evidence Act 1950 ('the EA') as their conduct of running away from the police had a direct bearing on the fact in issue as the drugs were found in the said house. In this regard, the appellants had to explain their
- F conduct as required by s 9 of the EA. In the instant case, the strength of the established facts gave rise to a strong inference that the appellants had knowledge of the impugned drugs in the house. The trial judge had correctly carried out his duty in assessing the evidence including the conduct of the appellants before he came to his decision. As such, there
- G was no misdirection by the trial judge on this issue. Further, it was also trite law that the appellate court should be slow in disturbing the finding of fact by the trial judge based on credibility of witnesses, as in the present case, and who had the advantage of seeing and hearing the witnesses unless the trial judge had wrongly evaluated the facts (see paras 14 &
- H 16–19).
- I (2) The fact that SP5 rented the room from the second appellant was crucial to show that the second appellant had the control or was an occupier of the house and would also demolished the defence that the appellants were only present in the house on the day of the incident as a guest to Ah Chong. The fact that SP5 rented the room from the second appellant was not challenged by the defence. The failure to cross-examine SP5 on this crucial fact amounting to the acceptance of SP5 testimony in regard to the said fact. This fact also supported the finding of the trial judge that the appellants' defence was an afterthought (see paras 23–25).

- (3) In relation to the issue of lapses in police investigation, SP10 had explained that he did not confiscate SP5's bag which contained the said tea because the tea was in the form of sachet and totally different from the packets that contained crystalline substances which were found in the house. The investigating officer had also taken all necessary measures to locate Ah Chong but his attempt was unsuccessful. In any event, the prosecution was only required to prove possession of the drugs by both the appellants and not the ownership or the tenancy of the house. In the present case both the appellants were in close proximity with the drugs. The learned trial judge was correct in finding that actual possession was established. In respect of the failure to locate SP5 for further cross examination by the defence, such failure was not fatal to the prosecution's case nor prejudice the defence as the defence was given ample opportunity to cross-examine SP5 which they did extensively. In totality, there were no lapses in the investigation by the police (see paras 29–34). A B C D
- (4) Based on paras 50 and 51 of the learned trial judge's grounds of judgment, His Lordship had clearly made an affirmative finding of actual possession of the drugs by the appellants and thereafter had invoked the presumption of trafficking under s 37(da) of the DDA. At the end of the trial, the learned trial judge held that the defence failed to rebut such presumption. Nowhere in his grounds of judgment had he mentioned s 37(d) of the DDA or any assertion which would appear that the trial judge had invoked the presumption under the said section. As such, the contention by counsel of the appellants on this issue was untenable (see paras 36–37). E F
- (5) The issue of failure of the prosecution to establish that the possession of drugs by the appellants was otherwise than in accordance with written law had already been decided by the recent Federal Court case of *Jazlie bin Jaafar v Public Prosecutor* [2020] 1 MLJ 417. The Federal Court decision was clearly applicable to the issue raised in the present case and therefore, the appellants' contention on this issue was also devoid of any merit (see paras 38–40). G
- (6) The trial judge's finding on common intention of both appellants was based not only on the appellants' conduct but also on inferences from the circumstances of the case. In addition, the court agreed with the trial judge's finding that the conduct of the appellants in fleeing from the scene showed that the appellants had knowledge of the drugs in the house. Both the appellants were in the house where the impugned drugs were found and both of them attempted to run away from the house when the police raided the house even after SP10 had introduced himself as a police officer. This further supported the trial judge's finding on the issue of common intention. Thus, the appellants contention with regards to this issue was also without merit (see paras 42–43). H I

A [Bahasa Malaysia summary]

Kedua-dua perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas kesalahan memperedar dadah berbahaya ('dadah tersebut') di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) Akta yang sama. Pegawai-pegawai polis yang diketuai oleh SP10 menemui dadah tersebut di rumah perayu. Fakta-fakta yang dibuktikan yang dirujuk oleh hakim bicara adalah seperti berikut: (a) DNA perayu kedua dijumpai pada berus gigi, pencukur dan sisir yang dirampas dari rumah tersebut; (b) SP5 yang didapati tidur di salah satu bilik di dalam rumah tersebut semasa serbuan telah menyewa bilik tersebut dari perayu kedua dengan sewa bulanan RM500; (c) kedua-dua perayu berlari keluar dari rumah dan bersembunyi di belakang rumah jiran ketika SP10 memperkenalkan dirinya sebagai polis; (d) pada masa yang material, perayu mempunyai kawalan ke atas rumah tersebut; dan (e) saksi pendakwaan boleh dipercayai. Dalam pembelaan, perayu-perayu berhujah bahawa mereka tidak mempunyai pengetahuan mengenai dadah tersebut dan rumah tersebut milik rakan mereka bernama Ah Chong yang telah meninggalkan rumah tersebut sebelum polis menyerbu rumah tersebut. Di akhir kes, hakim bicara yang bijaksana mendapati bahawa pembelaan perayu hanyalah penafian semata-mata dan pemikiran terkemudian dan pihak pembelaan gagal menyangkal anggapan pengedaran di bawah s 37(da) ADB dan selanjutnya gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Dalam rayuan semasa, perayu-perayu bergantung kepada alasan-alasan berikut: (i) hakim bicara telah melakukan salah arah yang serius dalam meletakkan pemberatan yang tinggi ke atas fakta bahawa perayu-perayu telah melakukan percubaan untuk melarikan diri ketika polis menyerbu rumah tersebut; (ii) hakim bicara terkhilaf dalam memberikan pemberatan yang terlalu tinggi terhadap keterangan SP5 bahawa dia menyewa bilik di rumah tersebut dari perayu kedua; (iii) hakim bicara telah tersalah arah kerana gagal mengambil kira kelompongan serius dalam penyiasatan polis dalam kes ini yang merangkumi kegagalan polis melakukan pemeriksaan kimia pada teh pelangsing yang terdapat di dalam beg SP5, kegagalan mengesan Ah Chong dan kegagalan mengesan SP5 untuk tujuan pemanggilan semula oleh pembelaan; (iv) hakim bicara dilihat seperti mengguna pakai kedua-dua anggapan pemilikan di bawah s 37(d) ADB dan anggapan pengedaran di bawah s 37(da) ADB pada akhir kes pendakwaan; (v) hakim bicara tersalah arah dalam undang-undang mengenai tafsiran yang betul terhadap s 37(da) ketika menggunakan anggapan tersebut; dan (vi) hakim bicara tersalah arah dalam undang-undang dan fakta mengenai isu niat bersama perayu-perayu.

I Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman oleh hakim bicara:

- (1) Tingkah laku perayu melarikan diri dari tempat kejadian boleh diterima di bawah s 8 Akta Keterangan 1950 ('AK') kerana tingkah laku mereka

melarikan diri dari polis mempunyai kaitan langsung dengan fakta yang menjadi isu kerana dadah tersebut dijumpai di rumah tersebut. Sehubungan itu, perayu harus menjelaskan tingkah laku mereka sebagaimana yang dikehendaki oleh s 9 AK. Dalam kes ini, kekuatan fakta yang terbukti menimbulkan inferens yang kuat bahawa perayu mempunyai pengetahuan tentang dadah yang dirampas di dalam rumah tersebut. Hakim bicara telah menjalankan tugasnya dengan betul dalam menilai keterangan termasuk tingkah laku perayu sebelum dia membuat keputusan. Oleh itu, tidak ada salah arah oleh hakim bicara mengenai isu ini. Selanjutnya, adalah undang-undang yang mantap bahawa mahkamah di peringkat rayuan harus tidak terburu-buru dalam mengganggu penemuan fakta oleh hakim bicara yang didasarkan kepada kredibiliti saksi, seperti dalam kes ini, dan yang memiliki kelebihan untuk melihat dan mendengar saksi melainkan hakim bicara telah menilai fakta dengan salah (lihat perenggan 14 & 16–19).

- (2) Fakta bahawa SP5 menyewa bilik dari perayu kedua sangat penting untuk menunjukkan bahawa perayu kedua mempunyai kawalan atau merupakan penghuni rumah tersebut dan juga akan menyangkal pembelaan bahawa perayu-perayu hanya ada di rumah pada hari kejadian sebagai tetamu Ah Chong. Fakta bahawa SP5 menyewa bilik dari perayu kedua tidak ditentang oleh pihak pembelaan. Kegagalan untuk memeriksa balas SP5 mengenai fakta penting ini membawa kepada penerimaan keterangan SP5 berkaitan dengan fakta tersebut. Fakta ini juga menyokong penemuan hakim bicara bahawa pembelaan perayu adalah pemikiran terkemudian (lihat perenggan 23–25).
- (3) Berkaitan dengan masalah kelompongan dalam penyiasatan polis, SP10 telah menjelaskan bahawa dia tidak merampas beg SP5 yang berisi teh tersebut kerana teh tersebut dalam bentuk uncang dan sama sekali berbeza dengan paket yang berisi bahan kristal yang dijumpai di dalam rumah tersebut. Pegawai penyiasat juga telah mengambil semua langkah yang diperlukan untuk mengesan Ah Chong tetapi percubaannya tidak berjaya. Walau bagaimanapun, pihak pendakwaan hanya perlu membuktikan pemilikan dadah oleh kedua-dua perayu dan bukan pemilikan atau penyewaan rumah tersebut. Dalam kes semasa, kedua-dua perayu berada berdekatan dengan dadah tersebut. Hakim bicara yang bijaksana betul dalam memutuskan bahawa pemilikan sebenar telah dibuktikan. Berkenaan dengan kegagalan untuk menjejaki SP5 untuk pemeriksaan balas lebih lanjut oleh pihak pembelaan, kegagalan tersebut tidak memudaratkan kes pendakwaan atau memprejudiskan pembelaan kerana pihak pembelaan diberi banyak peluang untuk memeriksa balas SP5 yang mana mereka telah memanfaatkan peluang tersebut sebaik-baiknya. Secara keseluruhan, tidak ada kelompongan dalam penyiasatan oleh polis (lihat perenggan 29–34).

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- A (4) Berdasarkan perenggan 50 dan 51 dari alasan penghakiman hakim bicara yang bijaksana, Yang Arif telah dengan jelas membuat dapatan yang tegas mengenai pemilikan sebenar dadah oleh perayu-perayu dan setelah itu telah mengguna pakai anggapan pengedaran di bawah s 37(da) ADB. Di
- B akhir perbicaraan, hakim bicara yang bijaksana berpendapat bahawa pihak pembelaan gagal menyangkal anggapan tersebut. Yang Arif tidak menyatakan langsung di dalam alasan penghakimannya mengenai s 37(d) ADB atau apa-apa dakwaan yang menunjukkan bahawa beliau telah mengguna pakai anggapan di bawah peruntukan tersebut. Oleh itu, hujahan peguam perayu-perayu mengenai isu ini tidak dapat dipertahankan (lihat perenggan 36–37).
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- D (5) Isu kegagalan pihak pendakwaan untuk membuktikan bahawa pemilikan dadah oleh perayu-perayu adalah selain daripada berdasarkan undang-undang bertulis telah diputuskan oleh kes Mahkamah Persekutuan *Jazlie bin Jaafar v Public Prosecutor* [2020] 1 MLJ 417 baru-baru ini. Keputusan Mahkamah Persekutuan dengan jelas terpakai untuk isu yang dibangkitkan dalam kes ini dan oleh itu, hujahan perayu-perayu mengenai isu ini juga tidak bermerit (lihat perenggan 38–40).
- E (6) Dapatan hakim bicara mengenai niat bersama kedua-dua perayu tidak hanya berdasarkan pada tingkah laku perayu tetapi juga pada inferens dari keadaan kes tersebut. Selain itu, mahkamah bersetuju dengan dapatan hakim bicara bahawa tingkah laku perayu-perayu dalam melarikan diri dari tempat kejadian menunjukkan bahawa
- F perayu-perayu mempunyai pengetahuan tentang dadah di dalam rumah tersebut. Kedua-dua perayu berada di dalam rumah di mana dadah tersebut dijumpai dan mereka berdua cuba melarikan diri dari rumah tersebut ketika polis menyerbu rumah tersebut walaupun SP10 telah memperkenalkan dirinya sebagai pegawai polis. Ini juga menyokong dapatan hakim bicara mengenai isu niat bersama. Oleh itu, hujahan
- G perayu-perayu berkenaan dengan isu ini juga tidak bermerit (lihat perenggan 42–43).]

Cases referred to

- H *Amri bin Ibrahim & Anor v PP and another appeal* [2017] 1 MLJ 1, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Ibrahim Mohamad & Anor v PP and another appeal [2018] supp MLJ 280; [2011] 4 CLJ 113, FC (refd)
Jazlie bin Jaafar v PP [2020] 1 MLJ 417; [2020] 2 CLJ 28, FC (folld)
- I *Lee Ah Seng & Anor v PP* [2007] 5 CLJ 1, FC (refd)
PP v Karim bin AB Jabar [2008] 3 MLJ 685; [2008] 5 CLJ 173, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Samundee Devan all Muthu Kerishnan v PP [2010] 2 MLJ 607; [2010] 3 CLJ 269, FC (folld)

Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd) **A**
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a), (2), First Schedule **B**
 Evidence Act 1950 ss 8, 9

Appeal from: Criminal Trial No 45A-06-02 of 2014 (High Court, Kuala Lumpur)

Gopal Sri Ram (KY Lee, HP Lim and Yasmeen Soh with him) (Yee & Lee Partners) **C**
for the appellant.

Nik Syahril bin Nik Ab Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nordin Hassan J (delivering judgment of the court): **D**

INTRODUCTION

[1] The appellants were convicted and sentenced to death by the High Court Kuala Lumpur for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same Act. The appeal is against the conviction and sentence. **E**

[2] The charge against the appellants reads as follows: **F**

Bahawa kamu bersama-sama, pada 9.9.2013, jam lebih kurang 8.45 malam, di rumah No 41, Jalan 3/100A, Taman Gemilang, dalam Daerah Cheras, di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 68,083.4 gram methamphetamine. Oleh itu, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama. **G**

THE PROSECUTION CASE

[3] The prosecution case which had been established through its witnesses briefly is as follows. On 9 September 2013, at about 8.45pm, acting on information received, ASP Suzalani bin Shafie (SP10), led a police team to a house in Taman Gemilang, Cheras. Upon reaching the said house, SP10 noticed that the gate was locked with a padlock. He then instructed his men to cut the padlock and thereafter entered the area of the house. Next, SP10 knocked the glass door of the said house and introduced himself as a police officer. At the same time, through the window of the house, SP10 saw two Chinese males who were in the house, ran towards the kitchen. SP10 then instructed his men to cut the padlock of the door grille and entered the house. **H**
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- A He also asked his men to chase and apprehend the two Chinese males. Meanwhile, SP10 went to a room upstairs where he found a Chinese lady (SP5) sleeping in the said room. SP10 also inspected the other rooms but no one else were found. The two Chinese males were then arrested by the police outside the house. Detective Lance Corporal Abdullah bin Hamzah (SP12) arrested the
- B first appellant at the rear of house No 41 whilst the second appellant was arrested by Detective Corporal Nickhom a/l See Bock at the back of house No 27. SP10 then brought SP5 downstairs to the hall where he then found 80 plastic packets with the name 'GUANYINWANG' labelled on the packets and nine packets labelled 'CHINA TEA'. In all the packets, SP10 found it
- C contained crystalline substances suspected to be dangerous drugs.

- [4] The crystalline substances were sent to the chemist, SP3, for analysis who then confirmed that the substances contained 68,083.4g of
- D methamphetamine, a dangerous drugs listed under the First Schedule to the DDA.

THE FINDING OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

- E [5] At the close of the prosecution case, the learned trial judge found that the prosecution had established actual possession, independent of presumption under s 37(d) of the DDA. It was the trial judge's finding that the element of custody, control and knowledge of the drugs by the appellant had been proven by the prosecution. In arriving at this finding, the trial judge has taken into
- F account, inter alia, the following established fact:
- (a) the second appellant's DNA were found on the tooth brush, shaver and comb which were seized from the house;
 - (b) SP5 rented one of the room in the house from the second appellant with a monthly rental of RM500;
 - (c) both appellants ran out from the house and hid behind the neighbours' house when SP10 introduced himself as a police officer;
 - (d) at the material time, the appellants had control of the house; and
 - (e) the prosecution's witnesses were credible.

- [6] Next, the trial judge had invoked the presumption of trafficking under s 37(da) as the amount of drugs involved is 68,083.4g, far exceeding 50g for the
- I invocation of the presumption.

[7] Further, the trial judge was satisfied that the crystalline substances found in the said house was methamphetamine, a dangerous drugs listed under the First Schedule to the DDA based on the evidence of the chemist, SP3.

[8] In the circumstances, on the maximum evaluation of the prosecution's evidence, the learned trial judge found that the prosecution had established a prima facie case against both the appellants and as such had directed both the appellants to enter their defence.

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THE DEFENCE

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[9] The first appellant gave his evidence on oath and in essence, his defence was that he had no knowledge of the impugned drugs although he saw the packets when he entered the hall of the said house. He further testified that the packets does not belong to him and on the date of the incident, it was the first time he went to the house that belong to his friend, Ah Chong. The first appellant testified that Ah Chong was together with him and the second appellant on that day but left before the police raided the house. The first appellant ran out from the house as he was afraid when he saw men with guns climbing the gate of the said house.

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[10] The second appellant also gave evidence on oath and basically his defence is similar with the first appellant that he had no knowledge of the drugs in the packets found at the hall of the house. He went to Ah Chong's house to meet up with the first appellant as he intended to go to the first appellant's house in Seremban which is nearer to the airport. The second appellant intended to visit his uncle in Sabah who was sick. He also testified that Ah Chong was with them on the date of the incident but left before the police raided the house.

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THE FINDING OF THE TRIAL JUDGE AT THE CONCLUSION OF THE TRIAL

[11] At the end of the trial, the learned trial judge found that the defence had failed to rebut the presumption of trafficking under s 37(da) and further failed to raise a reasonable doubt on the prosecution case. In the circumstances it was decided that the prosecution had proved its case beyond reasonable doubt against both the appellants for the offence of trafficking in dangerous drugs under s 39B(1)(a) of the DDA. Both the appellants were convicted and sentenced to death.

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[12] In coming to this decision, the learned trial judge has made his findings of fact that the appellants' defence were mere denials and an afterthought. These findings were premised on the following established facts:

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- (a) SP10 had knocked the glass door of the house and introduced himself as a police officer when he saw both appellants ran towards the kitchen;

- A (b) there were material discrepancies in the evidence of the first and second appellants;
- (c) the evidence of the second appellant that he came to Kuala Lumpur by bus and intended to visit his uncle in Sabah were not supported by
- B evidence including the bus and flight tickets;
- (d) the evidence of the first appellant is improbable when he testified that after having their meal at about 4 to 5pm, they went back to the house just to collect the second appellant's bag that was left in the bathroom before going to the first appellant's house. However, they remained in
- C the house until 8.45pm when the police raided the house and arrested them;
- (e) the fact that the second appellant intended to visit his uncle in Sabah was not raised during the prosecution case; and
- D (f) SP5's evidence that she rented a room in the house from the second appellant.

THE APPEAL

- E [13] In support of the appellants' appeal, the grounds advanced by the appellants are as follows:
- (a) the trial judge committed serious misdirection in placing great weight on the fact that the appellants had attempted to flee when the police
- F raided the house;
- (b) the trial judge erred in giving too much weight to the evidence of SP5 that she rented a room in the house from the second appellant;
- G (c) the trial judge misdirected himself in failing to take into account the serious lapses in the police investigation in the present case;
- (d) the trial judge appeared to apply both the presumption of possession under s 37(d) and the presumption of trafficking under s 37(da) of the DDA at the close of the prosecution case;
- H (e) the trial judge misdirected himself in law on the proper interpretation of s 37(da) when invoking the said presumption; and
- (f) the trial judge misdirected himself on the law and the facts on the issue of common intention on the part of the appellants.
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OUR DELIBERATION AND DECISION

The issue of the appellants' conduct in running away when the police raided the house

[14] Counsel for the appellants submitted that the trial judge misdirected himself in giving too much weight to the appellants' conduct in attempting to run away from the house. On this issue, firstly, the appellants' conduct in fleeing from the scene is admissible under s 8 of the Evidence Act 1950 as their conduct of running away from the police has a direct bearing on the fact in issue as the drugs were found in the said house. In this regard, the appellants has to explain their conduct as required by s 9 of the same Act. This has been lucidly explained by the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 as follows:

[39] In this case, *the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has the direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction.* However, in his defence, the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *Deputy Public Prosecutor v Brooks*). (Emphasis added.)

[15] Further, in another Federal Court case of *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] supp MLJ 280; [2011] 4 CLJ 113, the issue of conduct was dealt with in the following manner:

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation.

...

[20] Based on the above s 8(2) of the Evidence Act 1950, there are two types of conduct which is relevant, namely prior and subsequent conduct. *Evidence of conduct is an equivocal act and is capable of more than one interpretation. Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances.* (Emphasis added.)

[16] Reverting to the present case, we find, the learned trial judge was correct in assessing the appellants' conduct of running away from the police, together with other evidence before him in order to make a finding as to the significance of the said conduct. Assessment has to be made by the trial judge as to whether the conduct of fleeing from the scene was due to pure panic, being afraid of armed men raiding the house or because the appellants knew about the drugs in the house. Here the trial judge has made his findings of fact that the appellants' conduct in running away from the house showed that they have knowledge of the drugs in the house. In the grounds of judgment, at para 50,

A the trial judge said this:

B 50. ... Semasa diserbu polis, Tertuduh 1 dan Tertuduh 2 melarikan diri ke bahagian dapur. Daripada 'conduct' mereka ini menunjukkan mereka ada pengetahuan mengenai dadah-dadah berbahaya tersebut (rujuk keputusan kes *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19). Mereka tidak perlu melarikan diri kerana SP10 telah memperkenalkan diri sebagai polis sebelum rumah itu dipecah masuk. Oleh itu, Mahkamah membuat dapatan secara affirmative bahawa kedua dua Tertuduh mempunyai milikan ke atas rumah tersebut dan dadah berbahaya tersebut pada masa material.

C [17] Here, based on the evidence before him and having assessed the credibility of the witnesses, the trial judge had made his finding that the appellants' conduct in running away together with the other evidence, pointed to the fact that they have knowledge of the drugs in the house. On the same issue, it is also instructive to make reference to a Federal Court case of *Samundee Devan all Muthu Kerishnan v Public Prosecutor* [2010] 2 MLJ 607; [2010] 3 CLJ 269 where Mohd Ghazali Yusoff FCJ said this:

E [15] We also of the view that the contemporaneous conduct of the appellant in attempting to run away when PW7 identified himself as 'police' is relevant and admissible pursuant to s 8 of the Evidence Act 1950 under the circumstances of the instant appeal. Such conduct, of course not to be taken in isolation but together with all the other circumstances of the case. That would be the correct approach to circumstantial. (see *Chan Chwen Kong v PP* [1962] 1 LNS 22)

F ...

G [17] We find the evidence adduced by the prosecution before the learned trial judge showed that the appellant was clearly in possession of the plastic packages and that he had knowledge of the contents of the packages. The facts denote the said dangerous drugs were in his custody and control. He was in possession of a set of keys one of which was used to open the boot of the motorcar in which the dangerous drugs were found. *He was clearly aware of the packages when he was approached by the police and consequently attempted to run away. The combined strength of these facts gave rise to a strong inference that the appellant had mens rea possession of the packages containing the dangerous drugs and he had knowledge of the dangerous drugs. There was evidence of possession of the dangerous drugs independent of s 37(d) of the Act.* (Emphasis added.)

I [18] Likewise in the instant case, the strength of the established facts give rise to a strong inference that the appellants had knowledge of the impugned drugs in the house. The trial judge had correctly carried out his duty in assessing the evidence including the conduct of the appellants before he came to his decision. As such, we find, there was no misdirection by the trial judge on this issue.

[19] In relation to this, it is also trite law that the appellate court should be slow in disturbing the finding of fact by the trial judge based on credibility of witnesses and who had the advantage of seeing and hearing the witnesses unless the trial judge had wrongly evaluated the facts (see *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1 (FC), *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC)).

[20] The Federal Court in *Lee Ah Seng & Anor v Public Prosecutor* [2007] 5 CLJ 1 has also dealt with the same issue and held as follows:

the approach to be taken by the appellate court when dealing with a trial court's assessment of credibility of witness is well established by high authorities. *The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such findings of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding.* (Emphasis added.)

[21] In the instant case, there is no substantial or compelling reasons for this court to interfere with the finding of fact by the trial judge with regards to the conduct of the appellants in fleeing from the scene.

The trial judge's assessment of SP5's evidence

[22] In regard to this issue, counsel for the appellants contended that the trial judge erred in giving too much weight to the evidence of SP5, in particular that she rented a room from the second appellant. This is due to the fact that the house was rented to a person name Chong Yiew Cheing by its owner, SP4 and as such, the room could not have been rented to SP5 by the second appellant.

[23] The fact that SP5 rented the room from the second appellant is crucial to show that the second appellant had the control or is an occupier of the house and would also demolished the defence that the appellants were only present in the house on the day of the incident which was on 9 September 2013 as a guest to Ah Chong. In her evidence, SP5 unequivocally said that she rented the room from the second appellant with the monthly rental of RM500. She rented the room to place her product including slimming product and as a place to rest when she delivered the product to her customer in Kuala Lumpur. She stays in Taiping, Perak and usually stayed in the room about six days a month.

[24] Having perused the evidence of SP5, particularly the evidence through cross-examination, we find that the fact that SP5 rented the room from the second appellant was not challenged by the defence. The defence only suggested to SP5 that she was the main tenant of the house which she denied. In her evidence, upon being questioned by the defence counsel, she answered as follows:

- A** Q: Setuju, oleh kerana kamu penyewa bilik itu kamu adalah penyewa utama?
A: Tidak setuju.
Q: Cadangan, kamu tidak perlu sewa bilik itu kerana kamu ke situ 6 kali sebulan?
A: Saya sewa bilik itu kerana ada aircon.
- B** Q: Stok itu kamu letak di mana dalam rumah?
A: Dalam luggage pakaian saya.
- C** [25] The failure to cross-examine SP5 on the crucial fact that she rented the house from the second appellant amounting to the acceptance of SP5 testimony in regard to the said fact (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). This fact also supported the finding of the trial judge that the appellants' defence was an afterthought.
- D** [26] Further, the trial judge had also made his finding that SP5 rented the room from the second appellant with monthly rental of RM500. In his grounds of judgment at para 24, he said this:
- E** 24. SP5 adalah seorang perempuan China yang menyewa sebuah bilik di rumah tersebut dari tertuduh 2 dengan bayaran sewa RM500 sebulan. Dia tiada pengetahuan mengenai dadah yang dirampas di rumah tersebut di bahagian bawah di ruang tamu.
- F** [27] Here, we have no reason to interfere with the trial judge's finding of fact as it was supported by evidence and had evaluated the facts correctly especially in the absence of any challenge on the crucial fact as alluded to earlier. In the circumstances, the contention by the defence on this issue is without merit.
- The serious lapses in the police investigation*
- G** [28] On this issue, counsel for the appellants raised several reasons to support the contention of lapses in the investigation which were, failure on the part of the police to conduct chemical examination on the slimming tea found in PW5's bag, failure to locate Ah Chong and failure to locate SP5 for the purpose of recall by the defence.
- H**
- I** [29] As to the slimming tea found in SP5's bag, SP10 has explained that the tea were in the form of sachet ('uncang') and totally different from the packets that contained crystalline substances that were found in the hall of the house. Hence, SP10 did not confiscate SP5's bag which contained the said tea. Consequently, the issue of not conducting any chemical examination on the slimming tea does not arise or affects the prosecution's case.

[30] Next, the investigating officer had taken all the necessary measures to locate Ah Chong or his full name Chong Yew Chieng, including, with the help of other government agencies as reflected in his witness statement. However, his attempt was unsuccessful. In any event, the prosecution only need to prove possession of the drugs by both the appellants and not the ownership or the tenancy of the house. In this regard, it is of assistance to refer to the oft-quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 which explained the meaning of possession in the following words:

‘Possession’ itself as regards the criminal law is described as follows in *Stephen’s Digest* (9th Ed page 304):

A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as the owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in the case of need. (Emphasis added.)

[31] Further, both appellants were in close proximity with the drugs as the drugs were found at the hall of the said house. In fact, both appellants in their testimonies confirmed that they saw the packets at the hall when they entered the house. Here, close proximity of the appellants with the drugs is a fact that can establish actual possession of the drugs. This court in the case of *Public Prosecutor v Karim bin AB Jabar* [2008] 3 MLJ 685; [2008] 5 CLJ 173 has the occasion to deal with this issue and opined as follows:

[4] ... *The proximity of the respondent to the drugs at the front passenger seat is a fact relevant to establish actual physical possession.*

[5] In *Public Prosecutor v Foo Jua Eng* [1965] 1 LNS 137, the accused was charged with assisting in carrying on a public lottery. The evidence showed that the accused had been found by the police in a room, seated about three feet away from a dressing table on which the relevant exhibits were found. The Magistrate acquitted the accused. The prosecution appealed. In allowing the appeal, Raja Azlan Shah J (as His Royal Highness then was) said this:

With regard to the mental element, the learned Magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on the PW1. *But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. The circumstance is the physical proximity of the respondent to the exhibit in question.*

[6] So too here, *the learned judge having accepted the prosecution’s evidence as to the finding of the drugs, the identification of the police officer and the scuffle, failed to direct himself as to the proximity of the drugs to the respondent.* Indeed, nowhere in his judgment, did the trial judge address his mind to this fact. There is the added circumstance that the respondent was driving the car from one point to another with the proscribed drugs in it. (Emphasis added.)

A [32] Clearly, premised on the established facts in the present case as alluded to earlier, the learned trial judge was correct in his finding that actual possession of the drugs by the appellants had been established by the prosecution.

B [33] In addition, the failure to locate SP5 for further cross examination by the defence is not fatal to the prosecution's case nor prejudice the defence. The defence was given ample opportunity to cross-examine SP5 which they did extensively and in the present case after re-examination of SP5 was concluded and upon request made by the defence counsel, the defence was again given another opportunity to cross-examine SP5 on his monthly income.

C [34] In the circumstances, we are of the view that there was no lapses in the investigation of the present case by the police and the prosecution had established its case beyond reasonable doubt without any gaps that affect its case.

D

The issue of double presumptions

E [35] In relation to this issue, counsel for the appellants submitted that in reading the grounds of judgment of the trial judge it would appear that the trial judge had applied both the presumption of possession under s 37(d) and the presumption of trafficking under s 37(da) of the DDA at the close of the prosecution case and this is illegal.

F [36] Having read the trial's judge grounds of judgment, we disagree with this contention. The trial judge had clearly made an affirmative finding of actual possession of the drugs by the appellants and thereafter had invoked the presumption of trafficking under s 37(da). This is reflected in the grounds of judgment at paras 50 and 51 as follows:

G 50. ... Oleh itu, Mahkamah membuat dapatan secara afirmatif bahawa kedua-dua Tertuduh mempunyai milikan ke atas rumah tersebut dan dadah berbahaya tersebut pada masa material.

H 51. Lantaran itu, Mahkamah juga mengguna pakai anggapan di bawah seksyen 37(da) Akta Dadah Berbahaya 1952. Kedua-dua tertuduh juga dianggap mengedar dadah berbahaya tersebut (*Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] supp MLJ 280; [2011] 4 CLJ 113).

I [37] The use of a single presumption of trafficking by the trial judge is further confirmed when he decided at the end of the trial that the defence has failed to rebut the presumption of trafficking under s 37(da). Nowhere in his grounds of judgment had he mentioned 37(d) or any assertion which would appear that the trial judge had invoked the presumption under the said section. As such, the contention by counsel of the appellants on this issue is untenable.

The interpretation and invocation of s 37(da)

A

[38] Next, the defence raised an issue that the prosecution had failed to establish that the possession of drugs by the appellants was otherwise than in accordance with written law.

B

[39] This issue has already been decided by the recent Federal Court case of *Jazlie bin Jaafar v Public Prosecutor* [2020] 1 MLJ 417; [2020] 2 CLJ 28 where it was held as follows:

C

[36] Thus, it is clear that what is necessary to arrive at the presumption of 'trafficking' under s 37(da) in addition to proof of the relevant minimum weight of the dangerous drugs specified, is a finding of being 'in possession' of the dangerous drugs and we must add, not a finding of being 'in possession otherwise than accordance with the authority of the DDA or any other written law'. The reason is obvious. By virtue of s 36 of the DDA, it is not necessary for the prosecution to prove the element stated in the phrase in the italics.

D

[37] For reasons we have given, we hold that the learned judge of the High Court did not err in invoking the presumption under s 37(da) of the DDA in respect of both charges. We find no misdirection or appealable error on the part of the learned judge of the High Court ...

E

[40] The Federal Court decision is clearly applicable to the issue raised before us and therefore, the appellants' contention on this issue is also devoid of any merit.

F

Common intention

[41] Lastly, counsel for the appellants contended that the trial judge had relied on the conduct of both appellants in attempting to flee as constituting evidence to show common intention and once the attempt to flee is discounted, the finding of the common intention cannot stand.

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[42] On this issue, firstly, the trial judge's finding on common intention of both appellants was based not only on the appellants' conduct but also on inferences from the circumstances of the case. This is clearly mentioned in his grounds of judgment at para 53 in the following words:

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53. Mengenai elemen keempat, daripada 'conduct' dan juga keadaan kes, Mahkamah berpandangan kedua-dua tertuduh mempunyai niat bersama melakukan kesalahan mengedar dadah berbahaya tersebut menurut seksyen 34 Kanun Keseksaan. (Rujuk kes-kes *Lee Boon Siah & Ors v Public Prosecutor* [2014] MLJ 11, *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336, *Mahbob Shah v King Emperor* 1945 AIR PC 118). Dalam kebanyakan kes, Mahkamah boleh membuat inferen bahawa kedua-dua tertuduh mempunyai niat di bawah seksyen 34 KK daripada conduct mereka dan keadaan khas dalam kes ini. (Rujuk *Suresh v State UP* 2001 SCC, Janab's Key To The

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- A *Law of Evidence*, 4th Edition Revised by Dato' Mah Weng Kwai, *Pathmanathan & Ors v Public Prosecutor* (Mahkamah Persekutuan Cr Appeal 05-277-12 Tahun 2015)). (Emphasis added.)

- B [43] Additionally, as discussed earlier, we agreed with the trial judge's finding that the conduct of the appellants in fleeing from the scene in the circumstances of the present case, showed that the appellants had knowledge of the drugs in the house. Both appellants were in the house where the impugned drugs were found and both of them attempted to run away from the house when the police raided the house even after SP10 had introduced himself as a police officer. This further supported the trial judge's finding on the issue of common intention. Thus, the appellants contention with regards to this issue is also without merit.
- C

CONCLUSION

- D [44] Based on the aforesaid reasons and having scrutinised the evidence before the court and the grounds of judgment of the trial judge, we are satisfied that the conviction against the appellants are safe and the sentence are in accordance with the law. Hence, the appellants' appeal are dismissed and the conviction and sentence by the trial judge are affirmed.
- E

Appeal dismissed; conviction and sentence by trial judge affirmed.

Reported by Dzulqarnain Ab Fatar

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